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NO.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARMINE ROMANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the familiar banking practice of awarding gifts on a non-preferential basis to new depositors is embraced by 18 U.S.C. 1954, and whether the Circuit Court's conclusion that it is so embraced is wholly at odds with the legislative history and purpose of the statute, and is in conflict with this Court's opinion in *Williams v. United States* rendered after the Circuit Court's decision?

2. Whether the Second Circuit's rule permitting a conviction of 29 U.S.C. 186(b) (Taft-Hartley Act) without proof of *mens rea*, (A) conflicts with the rule in the Seventh and Tenth Circuits and (B) in a "RICO" prosecution unconstitutionally enhances to a serious felony the simultaneous conviction of two non-*mens rea* misdemeanors?

3. Whether the automatic closing of the courtroom doors during the charge to the jury merely because this has been the practice since time immemorial, violated the right to a public trial and conflicts with this Court's decision in *Globe Newpaper Co. v. Superior Court*?

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OPINION IN THE COURT BELOW

The decision of the United States Court of Appeals for the Second Circuit, which gives the reasons for the affirmance of the judgment of conviction, is set forth in the Appendix at page 1a.

GROUNDS FOR JURISDICTION OF THIS COURT

Judgment of conviction was entered in the United States District Court for the Southern District of New York on February 5, 1982, and the order of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction was entered on June 24, 1982. This Court has jurisdiction to review the judgment of the Circuit Court by Writ of Certiorari pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendments V and VI of the United States Constitution. These are set forth in the Appendix at pp. 21a.

STATUTORY PROVISIONS INVOLVED

This case involves 18 U.S.C. 1954; 18 U.S.C. 1961; 18 U.S.C. 1962; and 29 U.S.C. 186. These are set forth in the Appendix at pp. 22a-27a.

STATEMENT OF FACTS

This appeal raises for consideration the interpretation of statutes which have assumed an ever growing importance in federal law enforcement — offenses which serve as the predicate for a determination that an individual has engaged in a "pattern of racketeering" under the "RICO"* statute, 18 U.S.C. 1961 et seq. Unfortunately, the Circuit Court's interpretation is wholly at odds with the legislative history of the statute and the import of this Court's recent decision in *Williams v. United States*, __U.S.__ (1982).

*Racketeer Influenced and Corrupt Organizations

The Circuit Court effectively turns into a federal crime activity never contemplated by Congress and traditionally left to the states or to civil remedies. In addition, the appeal raises for consideration petitioner's right to a public trial and an interpretation of that right by the Circuit Court which is at odds with this Court's recent decision in *Globe Newspaper Co. v. Superior Court.* __U.S.__ (1982).

The facts are not in dispute. Petitioner's conduct for the most part was established by documentary evidence, the content of which he did not challenge in any way. He contends, however, that the conduct simply is not a federal crime.

A. Predicate Offense One: 18 U.S.C. 1954.

Petitioner was indicted for violating 18 U.S.C. 1962(d) (RICO conspiracy), 18 U.S.C. 1962(c) (RICO substantive offense), 18 U.S.C. 1954 (acceptance of a thing of value to influence an employee benefit plan), 29 U.S.C. 186(b)(1) (aiding and abetting receipt of illegal labor payments under the Taft Hartley law) and 18 U.S.C. 1951 (extortion). The conduct alleged under Section 1954 and the Taft Hartley counts also provided the basis for the pattern of racketeering activities alleged under the RICO counts. Petitioner was convicted on all counts except extortion which was dismissed by the District Judge after the Government offered no evidence to sustain it.

Petitioner was the Secretary-Treasurer of Local 359 of the Seafood Workers Union from May 1974 until May 1980. The local represents all the workers who handle fish at the Fulton Fish Market in Manhattan, the center of metropolitan New York's wholesale fish

industry. Petitioner was also an employee trustee of the Fulton Fish Market Welfare and Pension Fund.

The evidence showed that Republic National Bank in New York was making the familiar offer of gifts (known as "premiums") in return for depositors opening new accounts. If the depositor withdrew the principal before a specific period of time had elapsed, an interest penalty was imposed by the bank. Under the bank rules, the depositor or owner of the funds could not receive the premium. Instead, the depositor named a "sponsor" to receive the gift. The sponsor in turn could designate anyone else to actually receive the gift. A trustee of the Welfare Fund could not be a sponsor.

The evidence showed that from December 1974 through June 1977 the Welfare Fund opened 11 time deposit accounts with Republic National Bank, ranging in amount from $2,250 to $53,250. In each instance the application and bank agreement were signed by two or three trustees of the fund. Petitioner signed both documents for seven of the deposits. The bank records show that for three of the eleven deposits Petitioner was designated by the sponsors to receive the television sets which were the premiums. On the other occasions a relative or friends of Petitioner received the television sets.

The evidence also showed that all the deposits were made in the name of the Welfare Fund; that the bank was aware it was making gifts in return for the deposit of union pension funds; that the gifts awarded Petitioner or his friends were the same as would be given to any other member of the public making a similar deposit; and that Petitioner and the Welfare

Fund received no preferential treatment regarding the bank penalties to be imposed if the deposits were withdrawn before a specific date. In sum, this gifts-for-deposits arrangement was exactly the same as was open to all members of the public.

It was the contention of the Petitioner that this widespread and legal gifts-for-deposit arrangement is not the type of corrupt kickback scheme Congress intended to embrace within 18 U.S.C. 1954. For the reasons to be discussed below, *infra* p.7, the Circuit Court concluded otherwise.

B. Predicate Offense Two: 29 U.S.C. 186(b)(1)

The evidence relevant to the Taft-Hartley violation was similarly undisputed. In order to increase revenues, Petitioner suggested that Local 359 rent to the fish wholesalers plaques indicating the wholesaler employed union labor. The union adopted the practice and for approximately four years the union rented the plaques pursuant to written agreement for $25 per month. The record shows that all rental payments were made by check and were deposited in the union's bank account. The union kept complete records of all the payments. There are over 80 wholesalers in the Fulton Fish Market and over 30 did not rent the plaque. There is no indication of any union reprisals against a wholesaler who did not rent a plaque. Wholesalers who did rent the plaque, but fell behind in payments, were sent delinquency notices. Although no wholesalers appear to have formally cancelled the agreement, some wholesales had not paid for so many months that there was a *de facto* cancellation.

Petitioner argued in the District Court and the Court of Appeals that the Taft-Hartley violation required proof of *mens rea*. In accordance with many Second Circuit rulings, this argument was rejected. The trial court's charge appears in the Appendix at pp. 19a-20a.

C. Elevating Non-*Mens Rea* Misdemeanor Into Felonies.

Under the indictment the jury could have found that the pattern of racketeering required for the RICO offenses was based on two violations of the Taft Hartley statute — 29 U.S.C. 186(b)(1), which is a misdemeanor. Because under the Second Circuit rule the Taft Hartley violations did not require proof of *mens rea*, Petitioner argued that enhancing the simultaneous conviction of two non-*mens rea* misdemeanors into a 20 year felony* is unconstitutional. The argument was rejected below.

D. The Right to a Public Trial.

Prior to the charge to the jury, Petitioner objected that the right to a public trial was being violated when the court locked the courtroom doors and denied access to the public during the charge. The court indicated that nobody would be "permitted to enter and distract everybody, except the court reporters, and they are going to be permitted to enter and leave."** (Tr. 1490).** The District Judge also stated, "I am go-

*Petitioner received a sentence of 12 years.

**References are to pages of the trial transcript.

ing to continue to do what has been going on since I can remember back until the memory of man runneth not to the contrary." (Tr. 1491). The court made no particularized finding of the need to close the doors in this case.

ARGUMENT

POINT I

THE FAMILIAR BANKING PRACTICE OF AWARDING GIFTS ON A NON-PREFERENTIAL BASIS TO NEW DEPOSITORS IS NOT EMBRACED BY 18 U.S.C. 1954, AND THE CIRCUIT COURT'S CONCLUSION THAT IT IS SO EMBRACED IS WHOLLY AT ODDS WITH THE LEGISLATIVE HISTORY AND PURPOSE OF THE STATUTE, AND IS IN CONFLICT WITH THIS COURT'S OPINION IN *WILLIAMS v. UNITED STATES* RENDERED AFTER THE CIRCUIT COURT'S DECISION.

In *Williams v. United States*, __U.S.__ (decided June 29, 1982), this Court cautioned against interpreting a criminal statute in such a way as to make "a surprisingly broad range of unremarkable conduct a violation of federal law." 50 U.S.L.W. 4951. By ruling that the receipt of a bank's standard gift-for-deposit is a violation of 18 U.S.C. 1954, the Circuit Court engaged in just such a sweeping interpretation of federal law. Because Section 1954 is an important penal statute which has never been interpreted by this

Court, and because the Circuit Court's sweeping interpretation cannot be squared with the legislative history, the Writ of Certiorari should be granted.

The Circuit Court correctly did not base its decision on the fact that Section 1954 explicitly punishes any trustee of an employee pension benefit plan who received a "gift" because of his actions or decisions as a trustee. As this Court has noted, it is a "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979) quoting from *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). The principle "has particular application in the construction of labor legislation which is 'to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.'" *National Woodwork Mfrs. Assn. v. N.L.R.B.*, 386 U.S. 612, 619 (1967).

Indeed, the legislative history of Section 1954 exemplifies the Court's observation that "The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Watt v. Alaska*, __U.S.__, 101 S.Ct. 1673, 1677-1678 (1981).

The Circuit Court concluded that "the broad language used in the statute reflects Congress's in-

tent to reach all fiduciaries who profit (other than by their regular compensation) as the result of their decisions to invest union pension funds." (Opinion, App. 13a). The legislative history, however, simply does not support the conclusion that every such conflict of interest was intended by Congress to be a federal crime.

From the legislative history it is abundantly clear that Section 1954 was intended to deal with corrupt, illicit and generally secretive payments to pension fund trustees — bribes, kickbacks and payoffs. The statute was enacted in response to President Eisenhower's criticism of a previous union pension law which did not deal directly with the most flagrant pension abuses such as embezzlement* and kickbacks. House Report No. 998, 1962 U.S. Code Cong. and Adm. News p. 1532, 1533-1534.

Congress' concerns were expressed in detail in Senate Report No. 908, 87th Congress, 1st Session. This report is of particular significance because in the House-Senate conference the Senate's language for Section 1954 was adopted. 108 Cong. Rec. 4250 (1962).

At the outset the report indicates that the purpose of the legislative proposals is to:

> "provide criminal penalties for offering, accepting, or soliciting bribes or kickbacks in connection with the administration of these plans, stealing or embezzling plan funds or property, or making false statements in any document published or maintained pursuant to the act." S.R. 908 at 2.

*References in the Legislative history to embezzlement relate to 18 U.S.C. 664 which was enacted with Section 1954.

Legislative investigation determined that the greatest evils were the kickbacks and payoffs:

"Perhaps the greatest single abuse in the administration and operation of these plans is the kickback or payoff to influence the investment of the assets of the funds. The accessibility and use of vast sums of money by brokers and recipients may in these cases depend upon the willingness to kickback part of the broker's commission to administrators, officers, trustees, employees, and other individuals associated with the fund. In such matters the brokers may ask for fees well in excess of the usual percentage in order to permit the payment of the kickback without impairing the size of the commission for themselves. Kickbacks may take the form of cash, stocks, bonds, loans, undisclosed interests in the business venture receiving the loan, favors, preferred treatment or free services. The kickback may be paid by the broker, the loan recipient or by third parties at the recipient's direction. The loan itself may be made directly by the welfare and pension fund or may be made indirectly through a cloaking device involving third parties. In some of these cases letters of commitment may be issued by the officers of the plan, obligating the funds to make loans at future specified dates. The letters of commitment are then used as a basis for obtaining loans from banks or other lending institutions. In all of these cases, favorable action by the fund is induced by the kickbacks and payoffs." S.R. 908 at 4-5.

Section 1954 was then aimed at the kickback problem:

"A new section 1954 would also be added to the Criminal Code which would prohibit the giving or offering or the solicitation or receipt of kickbacks involving the fiduciaries associated with the plan, the

representatives of an employer related to the plan, the representatives of unions similarly related to the plan or the representatives of an organization, such as an accounting firm or an investment broker, providing services to the plan." (S.R. 908 at 11.

Also reflective of the type of abuse at which 1954 was aimed is the fact that Congress felt an immunity provision was needed, too, "for the effective prosecution of violators of this section in view of the clandestine and secretive methods which have been developed by parties to kickbacks and payoffs within the prohibitions of this section." S.R. 908 at 11.*

The view was the same in the House. 18 U.S.C. 664 was aimed at embezzlement, and Section 1954 was directed at kickbacks. House Report No. 998, 1962 U.S. Cong. and Adm. News p. 1532, 1533-1534. On the floor of the House, Representative Roosevelt said the bill was designed to punish "kickbacks", 108 Cong. Rec. 1730, and Representative Smith of Iowa, the author of the House bill,** said the package of bills was intended to make "embezzlement, kickbacks, bribery and looting from these funds Federal felonies." 108 Cong. Rec. 1739.

It is therefore apparent that Section 1954 was aimed at highly corrupt practices and arrangements designed to influence fund trustees' investment and use of pension funds.

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*The Report also expresses concern about "collusion" between fund administrators and others. S.R. 908 at 4.

Against this legislative backdrop it is apparent that the "gift" to Petitioner is not embraced by Section 1954. The record shows Petitioner learned of the gifts for deposits from a newspaper advertisement. The deposits were made in the name of the pension fund and they were legal and regulated by federal law;* the bank was aware it was making gifts in return for the deposit of union pension funds; the gifts awarded Petitioner or his friends were exactly the same as would be given to any other member of the public making a similar deposit; and Petitioner and the Fund received no preferential treatment regarding the bank penalties to be imposed if the deposits were withdrawn before a specific date. There is also absolutely no evidence that Petitioner sought to negotiate or secure preferential treatment for himself or the pension fund from the bank. In sum, there was no kickback, payoff or bribe here.

Of perhaps even more significance than the Senators' views are the views of the Department of Justice at the time the legislation was pending in Congress. These views are important because the Department is the agency charged with the enforcement of the statute and the Department explained its interpretation of the statute to the Congress while the bill was pending. *United States v. Board of Commissioners*, 435 U.S. 110, 131-132 (1978); *Bellotti v. Baird*, 428 U.S. 132, 143 (1976); *Summit Airlines v. Teamsters Local No. 295*, 628 F.2d 787 (2nd Cir. 1980) (statements of attorney representing group which drafted legislation are given great weight in construing the statute).

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*See, e.g. 12 CFR 217.147.

The Department's views are incorporated in Senate Report No. 908 and there is therefore good reason to believe the Congress agreed with and adopted the Department's views. *United States v. Board of Commissioners, supra* at 135. Responding by letter to a request to state the Department's views on the need for new criminal provisions in the welfare and pension field, then Assistant Attorney General Herbert J. Miller, Jr. indicated that the Department's experience "indicates that the abuses in the area are often highly sophisticated and effective." S.R. 908 at 14. He then went on to describe the problem:

> "Although kickbacks for the benefit of pension fund administrators can take many forms, one complex example is the use of the straight bribe to obtain a loan from the fund. To achieve this result a cash payment is made prior to obtaining the loan to a third party ostensibly unrelated to the fund. The loan itself will then be made in an amount large enough to cover the previous payoff with high-risk real estate or otherwise questionable security as collateral. The bribe or kickback is consummated when the third party passes part or all of the bribe back to the trustees of the fund.
>
> "Where the fund is unable to lend the money immediately, a letter of credit can often be purchased to achieve similar ends. The letter of credit makes interim financing possible, and actual financing is usually secured from legitimate sources after the high-risk hotel or restaurant, for example, is constructed. Sometimes the bribe takes the form of a part interest given to a third party in the business venture to be financed, or the loan will be obtained from a friendly bank in return for a time deposit by the fund. Each of these transactions, often involving millions of dollars, result in an improper exercise of the administrator's fiduciary responsibilities." S.R. 908 at 15.

The letter then gave the Department's views on the purpose and intent of the legislation:

> "The proposed criminal provisions presently pending before the subcommittee are designed to strike at the very heart of these abuses. These proposals make the embezzlement of welfare or pension funds a Federal crime and prohibit the making of kickbacks to fund fiduciaries, and provide a criminal sanction to implement more effectively the disclosure of the act.
>
> *Although the kickback provisions could technically be read to prohibit the smallest gift, the legislation is designed solely to deal with the complex transactions outlined above, and the Department has no desire to police customary and de minimis business or social gratuities.*" S.R. 908 at 15-16. (emphasis supplied).

Thus, the Justice Department clearly disavowed a "technical" reading of the statute and indicated that Section 1954 was aimed at punishing illicit kickback-type arrangements which seriously compromise the trustee. Customary business gratuities—such as the standard bank gift-for-deposit—were clearly not embraced by Section 1954 according to the Department.

In light of the foregoing history, the Circuit Court's reliance on the isolated remark of one Senator that the statute is intended to establish "Federal criminal sanctions for violations of trust" (App. 13a) is wholly unpersuasive. Indeed the general Congressional approach has been to impose civil penalties for a trustee's breach of his fiduciary responsibilities, Employee Retirement Income Security Act, 29 U.S.C.

1109,* and the Second Circuit itself has agreed that a trustee's breach of his fiduciary duty is not automatically translatable into a crime. *U.S. v. Snyder*, 668 F.2d 686, 691 (2nd Cir. 1982).**

In the final analysis the Circuit Court seemed concerned that if Petitioner's conduct did not violate Section 1954 it probably was not a federal crime at all. (App. 14a). But this is not justification for wrenching 1954 from its legislative history and claiming there is criminal liability for acts not within Congress' intention.

The implications are serious. Because Section 1954 makes the donor and the recipient of the "gift" equally liable, the Circuit Court's opinion creates criminal liability for the banking community, too. Yet, it is unimaginable that Congress intended that

*29 U.S.C. 1109 is set out in the Appendix at p. 27a.

**Before the Circuit Court the Government agreed that Petitioner's deposit of the pension funds was not unlawful. Nor was his mere receipt of the television sets unlawful. What is criminal, argued the Government, is that Petitioner kept the gifts for himself instead of passing them on to the pension fund. (Gov. Br. 25-26). The Circuit Court seemingly accepted this hypothesis. But guilt based on such a hypothesis conflicts with *U.S. v. Carbone*, 327 U.S. 633 (1946), in which the Court noted that what an individual did with lawfully received funds "cannot operate retroactively" to make receipt of the funds a crime. See also, *Arroyo v. United States*, 359 U.S. 419 (1959).

bankers could be criminally liable for the widespread use of non-preferential gifts-for-deposits.*

Every wrong is not a federal crime. Because the Second Circuit has enlarged 1954 beyond its intended scope; and because Section 1954 is an important statute in federal law enforcement, being a predicate for establishing a pattern of racketeering activity under RICO, the writ should be granted.

POINT II

THE SECOND CIRCUIT'S RULE PERMITTING A CONVICTION OF 29 U.S.C. 186(b) (TAFT-HARTLEY) WITHOUT PROOF OF *MENS REA*, (A) CONFLICTS WITH THE RULE IN THE SEVENTH AND TENTH CIRCUITS, AND (B) IN A "RICO" PROSECUTION, THE RULE UNCONSTITUTIONALLY ENHANCES TO A SERIOUS FELONY THE SIMULTANEOUS CONVICTION OF TWO NON-*MENS REA* MISDEMEANORS.

A. Conflict in the Circuit Over *Mens Rea* Requirement

A long line of cases in the Second Circuit holds that proof of a violation of 29 U.S.C. 186(b) does not require evidence of *mens rea*. The Government need not prove the defendant acted with a bad purpose or with knowledge his conduct was unlawful; it need only prove in the case of a union official that he received

*In this case, nothing distinguishes the conduct of Republic National Bank from Petitioner's inasmuch as the bank knew it was giving gifts for pension fund deposits. At oral argument before the Second Circuit, the Government could not advance any distinction.

money from a person he knew was an employer of the persons he represented. *U.S. v. Ricciardi*, 357 F.2d 91 (2nd Cir. 1966) *cert. denied*, 384 U.S. 942, 385 U.S. 814 (1966); *U.S. v. Overton*, 470 F.2d 761 (2nd Cir. 1972) *cert. denied*, 411 U.S. 919 (1973); *U.S. v. Boylan*, 620 F.2d 359 (2nd Cir. 1980) *cert. denied*, 449 U.S. 833 (1981); *U.S. v. Scotto*, 641 F.2d 47 (2nd Cir. 1980) *cert. denied*, __U.S.__, 101 S.Ct. 3109 (1981).

The Second Circuit's view is based on this Court's dictum in *U.S. v. Ryan*, 350 U.S. 299, 305 (1956), that the statute "appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative."

But the Seventh and Tenth Circuits have offered different interpretations. Thus, in *U.S. v. Inciso*, 292 F.2d 374 (7th Cir. 1961) *cert. denied*, 368 U.S. 920 (1961), the Seventh Circuit expressly ruled that "willfully violates" in Section 186 "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for the section." 292 F.2d at 380.

The Seventh Circuit maintained this standard in two later cases, *U.S. v. Keegan*, 331 F.2d 257 (7th 1964) *cert. denied*, 379 U.S. 828 (1964), and *U.S. v. Kaye*, 556 F.2d 855 (7th Cir. 1977) *cert. denied* 434 U.S. 921 (1977), indicating that "the minimum proof to convict under Section 186 is that defendant showed 'reckless disregard for that section.' " 331 F.2d 262. Observing that recklessness is based on two elements—actual knowledge of the facts surrounding the event and knowledge the conduct is likely to be illegal—the Court noted the second el[illegible] can be

established by the objective reasonable man test and went on to uphold charges containing only the first element of recklessness—knowledge the money came from an employer—because as a matter of law in those cases the reasonable man test was satisfied. In a later case, *U.S. v. Simpson*, 561 F.2d 53 (7th Cir. 1977), the Circuit explained that in *Keegan* and *Kaye* the reasonable man test was applied by the court as a matter of law. 561 F.2d 62 n.12. There has therefore been no abandonment or departure from *Inciso*.

Similarly, the Tenth Circuit has described as "accurate" a charge which required knowledge the conduct was unlawful or a disregard for whether the conduct is lawful or not. *Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959) *cert. denied* 361 U.S. 929 (1960).

The views of the Seventh and Tenth Circuits are in accord with this Court's view that in a criminal statute "willfully" "generally means an act done with a bad purpose," or "a thing done without ground for believing it is lawful," or "conduct marked by careless disregard whether or not one has the right so to act." *U.S. v. Murdock*, 290 U.S. 389, 394 (1933).

As this Court has noted, strict liability laws have a "generally disfavored status," *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978), and have been limited to matters inherently dangerous to the public health, welfare or morals. *U.S. v. Balint*, 258 U.S. 250 (1922) (drugs); *U.S. v. Dotterweich*, 320 U.S. 277 (1943) (pharmaceuticals); *U.S. v. Freed*, 401 U.S. 601 (1971) (weapons). These considerations are not applicable to a Section 186 violation.

In language that could be applicable to Section 186, the Court has observed that the use of strict liability

> "would be difficult to square with the generally accepted functions of the criminal law . . . The criminal sanctions would be used, not to punish conscious and calculated wrongdoing at odds with statutory prescriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken." *United States v. United States Gypsum Co., supra*, 438 U.S. at 442. (emphasis in original).

Section 186(b) is an important penal provision not only in its own right, but also because it is a predicate offense for a RICO prosecution. Because the Second Circuit's view marks a departure from the generally limited applicability of strict liability crimes, and because the Circuit's view conflicts with other Circuits, the writ should be granted.

B. Unconstitutionally Enhancing Non-*Mens Rea* Misdemeanors Into Felonies

Because two Taft Hartley violations form the basis for finding a pattern of racketeering under the RICO statute, 18 U.S.C. 1961, the Second Circuit's interpretation of Section 186 means that in a RICO case the simultaneous conviction of two non-*mens rea* misdemeanors is enhanced to a serious 20 year felony. This is unconstitutional.

Imposition of a severe penalty for a crime which does not require proof of *mens rea* can violate Due Process as well as the Eighth Amendment. *Lambert v. California*, 355 U.S. 225, 231 (1957) (Frankfurter, J. dissenting); *Holdridge v. United States*, 282 F.2d 302

(8th Cir. 1960) (Blackmun, J.), cited with approval, *United States v. Freed*, 401 U.S. 601, 613 n.4 (1971) (Brennan, J. concurring).

It is clear that Congress can severely enhance the punishment meted out for a felony because of a defendant's previous convictions. *Rummel v. Estelle*, 445 U.S. 263 (1980). It also seems clear that a second conviction of a misdemeanor can become a felony, at least when counsel has represented the defendant on both occasions. *Baldasar v. Illinois*, 446 U.S. 222 (1980).

But these and other decisions upholding recidivist statutes lend no support to the RICO statute which, under the Second Circuit's interpretation of Section 186(b), enhances two violations of a misdemeanor requiring no *mens rea* into a felony punishable by up to 20 years imprisonment.

The recidivist statutes are different from RICO in two important respects. First, as in *Rummel v. Estelle* the statutes require proof of *mens rea*. Second, under recidivist statutes conviction of the predicate offense or offenses occurs at different times, not simultaneously as under RICO. Thus, under a recidivist statute, even if the crimes did not require *mens rea*, the first conviction would at least put the offender on notice that certain future conduct will be deemed criminal. Under RICO, however, because the 186 convictions occurred simultaneously, the appellant was never put on notice that seemingly innocent conduct would subject him to a very severe sentence.

In *Jones v. Helms*, __U.S.__, 101 S.Ct. 2434 (1981), the Court examined the constitutionality of a

statute which made it a misdemeanor for a parent to abandon a child and a felony if the parent left the state after the abandonment. In upholding the constitutionality of the law the Court was very careful to note that while the statute required no *mens rea* for the departure from the state, the underlying abandonment did require criminal intent or wilfullness. This saved the statute from the infirmity mistakenly attributed to it by the lower court: converting a series of "noncriminal acts" into a felony. 101 S.Ct. 2438 n.10. With one element of the crime requiring proof of *mens rea*, it was proper to enhance the misdemeanor to a felony because "the State may treat the entire sequence of events, from the initial offense to the departure from the State, as more serious than its separate components." 101 S.Ct. at 2441.

But according to the Second Circuit two 186 violations are enhanced to a severe felony which is "more serious than its separate components," without any *mens rea* requirement. This conversion of a series of "noncriminal acts" into a felony is a violation of Due Process as well as the proscription against cruel and unusual punishments. The writ therefore should be granted.

POINT III

THE AUTOMATIC CLOSING OF THE COURTROOM DOORS DURING THE CHARGE TO THE JURY MERELY BECAUSE THIS HAS BEEN THE PRACTICE SINCE TIME IMMEMORIAL, VIOLATED THE RIGHT TO A PUBLIC TRIAL AND CONFLICTS WITH THIS COURT'S DECISION IN GLOBE NEWSPAPER CO. V. SUPERIOR COURT.

Because a "presumption of openness inheres in the very nature of a criminal trial under our system of justice," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, (1980) (plurality opinion), the automatic closing of a portion of the trial to the public without particularizing the need for the closure violates the right to a public trial under the First and Sixth Amendments. *Globe Newspaper Co. v. Superior Court*, __U.S.__(1982).

The trial court closed the courtroom during the charge because he did not want any distractions and because "I am going to continue to do what has been going on since I can remember back until the memory of man runneth not to the contrary." (Tr. 1491).

But there is no evidence that closure was required to insure a quiet courtroom and an attentive jury. Crowds of spectators or journalists had not been entering or leaving the courtroom during the earlier portions of the trial. And although the trial judge would not let members of the public enter during the charge, he did state he would allow the court stenographers to enter and leave. (Tr. 1490).

The court's ruling also effectively elevates the charge to the jury to a place not occupied by any other phase of the trial. Yet a logical argument can be made that the defendant's own testimony or counsel's closing arguments to the jury are as important as, if not more important than, the charge to the jury. Yet the courtroom is not closed during these moments in the trial on the chance that the jury may otherwise be distracted by an entering spectator.

By referring to a footnote in this Court's opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581-82 n. 18 (1980), the Circuit Court suggested that this was a reasonable time, place and manner restriction. (App. 17a). But the footnote's concern that trials be conducted "in a quiet and orderly setting," or that the limited seating capacity of a courtroom may necessitate reasonable access restrictions, are inapposite to this case. There is absolutely no showing that the charge would not have occurred in a quiet and orderly setting had the doors remained unlocked, and no showing that attendance had exceeded the courtroom's capacity. No one was clamoring to enter the courtroom, and apparently no one actually tried to enter during the charge.* The fact that some spectators were present in the courtroom is not dispositive because the right to a public trial does not depend on all persons arriving at the appointed hour, particularly where, as here, there was no advance public notice of the time of closure. *cf U.S. v. Criden*, 675 F.2d 550 (3rd Cir. 1982).

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*The defendant's right to a public trial does not depend, of course, on his being able to identify a particular member of the public who wanted to gain access to the courtroom.

Counsel's research discloses no federal case which has passed on the issue raised here. The petition by co-defendant Peter Romano, which Petitioner hereby adopts, indicates that state cases which have examined the issue have concluded that closure during the court's charge violates the right to a public trial. (Pet. for P. Romano, pp. 4-8).

As the trial court observed, closure during the charge is the established procedure. But longevity is not to be confused with constitutionality. Because this appeal concerns an automatic but unconstitutional practice which occurs at many criminal trials, the writ should be granted.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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